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No. 93-464

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

G-K DEVELOPMENT COMPANY, INC.
Petitioner,

vs.

BROADMOOR PLACE INVESTMENTS, L.P., et al.
Respondents.

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT FORREST L. ROBINSON IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

On October 31, 1989 Broadmoor Place Investments, L.P., a Kansas limited partnership (hereinafter "Debtor"), filed a voluntary petition under title 11, chapter 11, United States Code, in the United States Bankruptcy Court for the District of Kansas. The Debtor owned a single asset, an office building located in Mission, Kansas known as Broadmoor Place. When Debtor filed its Chapter 11 petition, it owed more than $9 million to Respondent Resolution Trust Corporation as Receiver of Blue Valley Federal Savings & Loan Association (hereinafter "RTC").

On June 19, 1990, petitioner G-K Development Company (hereinafter "G-K") submitted an offer for the sum of $5.3 million for the purchase of Debtor's office building. The purchase price was raised to $5.7 million in an Addendum to the offer submitted on July 18, 1990. The G-K offer was subject to financing and other contingencies. On August 7, 1990, respondent Forrest L. Robinson (hereinafter "Robinson") submitted an offer for the purchase of Debtor's office building in the amount of $5.5 million dollars. The Robinson offer was for cash, had no material contingencies, and provided for a $50,000 earnest money deposit. On August 8, 1990, Debtor filed its Application for Order Approving Sale of Real Property Free and Clear of Liens and Encumbrances with the bankruptcy court. Debtor's Application presented G-K's offer as the favored one. Notice was sent to all parties in interest on August 8, 1990 that the bankruptcy court would entertain the Debtor's motion to sell Broadmoor Place and that objections to the sale were to be filed by September 4, 1990, with the hearing to be held on September 10, 1990. This gave the interested parties one month to prepare for the hearing.

The hearing of September 10 was scheduled during the

bankruptcy court's regular week of hearings scheduled for less than ten minutes. When the clerk called the case, the attorney for the Debtor stated that this hearing could be lengthy. Thus the bankruptcy judge stated that he would put the matter on the "heel," and no objections were made. Mr. Ronald Gold, himself an attorney and president of G-K, was present at the beginning of the September 10 hearing, as was his attorney, Ms. Janice Stanton. Mr. Gold then left the hearing because of a business appointment without testifying or presenting evidence.

On September 10, 1990, after hearing the evidence presented by the parties, the Court approved the sale of real property to Robinson. The Court found that the Robinson offer was more advantageous to the bankrupt estate because it paid $50,000 in earnest money deposit and provided for fewer contingencies and a more immediate closing than the G-K offer.

On September 24, 1990, G-K filed its Motion for Reconsideration and Rehearing of Order Approving Sale of Property Free and Clear of Liens and Encumbrances. On October 11, 1990, after hearing the arguments of counsel, the bankruptcy court denied the motion of G-K for reconsideration of the court's order, finding that the evidence that G-K sought to present could have been presented on September 10, 1990, but for their own neglect. An Order to this effect was entered by the bankruptcy court on November 1, 1990. On November 6, 1990, G-K filed its Notice of Appeal and a Motion for Stay with the bankruptcy court. The bankruptcy court denied the Motion for Stay on November 19, 1990. G-K then filed a Motion for Stay with the United States District Court for the District of Kansas on November 27, 1990. No action was taken by G-K on the Motion for Stay, and the sale of the real property to Robinson took place on December 7, 1990.

On July 26, 1991, the bankruptcy court entered its

Supplemental Opinion to the November 1, 1990 Order on Motion of G K Development Company for Reconsideration (hereinafter "Supplemental Opinion"). The Supplemental Opinion added findings to the order of September 10, 1990 and the denial of G-K's Motion for Rehearing on November 1, 1990. G-K appealed the Supplemental Opinion on August 16, 1991.

On August 14, 1991, the district court entered its Memorandum and Order remanding the matter to the bankruptcy court for a determination of whether Robinson was a "good faith purchaser." On November 25, 1991, the bankruptcy court held a hearing, and on November 29, 1991, the bankruptcy court made an explicit finding that Robinson was a good faith purchaser under 11 U.S.C. §363(m). Despite Petitioner's contention that the bankruptcy court unfairly quashed all efforts of Petitioner for discovery from both the Debtor and Robinson, the bankruptcy court found that the record before the court was sufficient to make the determination that Robinson was a good faith purchaser. G-K appealed this finding to the district court.

The RTC moved to dismiss both of G-K's appeals as moot in accordance with 11 U.S.C. §363(m). The district court granted the RTC's motion and dismissed G-K's appeals by orders entered January 15, 1992 and February 12, 1992. The district court ruled that G-K's appeals were moot within the meaning of section 363(m) because the September 14, 1990 Order and the sale of Broadmoor Place were not stayed pending G-K's appeal, the sale closed on December 7, 1990, and Robinson was a good faith purchaser.

On February 13, 1992 and February 18, 1992, Notices of Appeal were filed from the district court orders to the United States Court of Appeals for the Tenth Circuit. Those cases were consolidated on appeal. On May 21, 1993, the Tenth Circuit affirmed the District Court's dismissal on the basis of mootness.

The court of appeals found that the record in the bankruptcy court failed to establish collusion between Robinson and the Debtor and demonstrated that the Debtor actually favored the G-K offer. On June 2, 1993 petitioner filed a Suggestion for Rehearing En Banc and Petition for Rehearing. The Tenth Circuit denied both the Petition for Rehearing and Suggestion for Rehearing En Banc on June 17, 1993.

Petitioner's statement of the case misstates several key facts. Petitioner asserts that it signed a "contract" and an addendum to that "contract" with Debtor. No contract was entered into between petitioner and Debtor; rather, petitioner's alleged contract was really an offer since it required bankruptcy court approval pursuant to 11 U.S.C. §363(b). Petitioner was merely an unsuccessful bidder at a bankruptcy sale and never had a "right" to purchase the office building, as such a "right" is not granted until approval of the sale by the bankruptcy court.

Note should also be made that petitioner's increase of its offer to $5.7 million was expressly conditional on the consummation of a lease with the Internal Revenue Service and that Debtor would have to pay the cost of tenant improvements for the space which approximated $250,000. Robinson's contract contained no such contingency. However, as per the Order of September 14, 1990, (see Appendix 12, Petition for Writ of Certiorari) Robinson, on September 11, 1990 accepted the IRS lease and assumed the tenant improvement obligations of $250,000. Therefore, the total consideration received by the Debtor's estate was greater under the Robinson offer than the amended offer of petitioner.

Petitioner further alleges that Debtor violated its written representation to petitioner not to enter into any other contract. Even if such a written representation could be interpreted to prohibit petitioner from entering into any other contract, the

G-K offer was subject to bankruptcy court approval and thus the written representation was ineffective because the bankruptcy court did not approve the G-K offer.

Petitioner also misstates that when Debtor filed its application for approval of sale with the bankruptcy court, Debtor did not seek approval of a specific contract but instead asked the court to approve either petitioner's or Robinson's contract. Paragraph 6 of the Application for Order Approving Sale of Real Property Free and Clear of Liens and Encumbrances filed by the Debtor states that Debtor favors acceptance of the G-K offer. See Appendix 4, Petition for Writ of Certiorari. Debtor informed Mr. Robinson that his offer was regarded as a back-up to G-K's. Debtor presented both offers to the bankruptcy court in order to provide interested parties an opportunity to offer recommendations for consideration by the court. See Appendix 7, Petition for Writ of Certiorari.

In its Petition for Writ of Certiorari, petitioner stresses that Debtor did not disclose Robinson's partner in its Application and Notice of Hearing. The bankruptcy court in its Order dated December 7, 1990 approving the sale specifically found that adequate and sufficient notice and opportunity for hearing were given in connection with the Application and that the notice and the opportunity to be heard satisfied in all respects 11 U.S.C. §§102(1)(a) and 363, and Federal Rules of Bankruptcy Procedure 2002 and 4001.

SUMMARY OF ARGUMENT

Petitioner alleges in its Petition for Writ of Certiorari that the circuit courts of appeals are divided on the issue of whether an appeal is moot under 11 U.S.C. §363(m) where a stay order has not been obtained. The Tenth Circuit does not recognize any

exceptions to the general rule that absent a stay, upon completion of a sale to a good faith purchaser, the court must dismiss a pending appeal as moot. While four circuit courts have adopted limited exceptions to section §363(m), none of these exceptions would apply to this case even if it were brought in one of those circuits.

Petitioner G-K was accorded a full and fair hearing by the bankruptcy court concerning its offer to purchase Broadmoor Place. All relevant facts concerning petitioner's offer and Robinson's offer and the status of Robinson as a good faith purchaser were presented to the bankruptcy court and appear in the record. The bankruptcy court determined that the Robinson offer was more favorable to the bankruptcy estate because the Robinson offer was for cash, had no material contingencies, and provided for a $50,000 earnest money deposit. The only creditor receiving proceeds from the sale supported the bankruptcy court's determination. Petitioner has no standing to appeal the orders of the bankruptcy court, the district court or the Tenth Circuit, and its appeals are moot.

Throughout its Petition, petitioner asserts that the Tenth Circuit decision conflicts with several United States Supreme Court and lower court decisions. The facts at bar are readily distinguishable from the United States Supreme Court decisions relied upon by petitioner, and the existence of a conflict between the Tenth Circuit decision and lower court decisions does not present a valid basis for granting certiorari. Petitioner has not set forth special and important reasons why this Court should review the Tenth Circuit decision. Therefore, pursuant to Supreme Court Rule 16, the Petition for Writ of Certiorari should be denied and the order of the United States Court of Appeals for the Tenth Circuit should remain undisturbed.

ARGUMENT

I. PETITIONER, A MERE UNSUCCESSFUL BIDDER, HAS NO STANDING TO APPEAL THE BANKRUPTCY COURT APPROVAL OF THE SALE OF THE BROADMOOR PLACE TO RESPONDENT ROBINSON.

G-K has no standing to appeal the September 14, 1990 Order because G-K is nothing more than an unsuccessful bidder for Broadmoor Place. "Standing may be raised at anytime in the judicial process." ANR Pipeline Co. v. Corporation Commission of State of Oklahoma, 860 F.2d 1571, 1578 (10th Cir. 1988), cert. denied, 490 U.S. 1051 (1989). The right to appellate review in bankruptcy cases is restricted to "'persons aggrieved,' i.e. to those persons whose rights and interests are 'directly and adversely affected pecuniarily' by the decree or order of the bankruptcy court." Holmes v. Silver Aviation, Inc., 881 F.2d 939, 940 (10th Cir. 1989).

A bidder at a bankruptcy sale is a stranger to the bankruptcy estate and has no rights or interest at stake, save the business opportunity he seeks. If his bid is rejected and a competing bid is approved, the unsuccessful bidder will suffer no pecuniary injury. He will simply miss out on a business opportunity. Accordingly, an unsuccessful bidder at a bankruptcy sale has no standing to object to, and no standing to appeal a Bankruptcy Court's rejection of his bid and approval of a competing bid. In re HST Gathering Co., 125 B.R. 466, 468 (W.D. Tex. 1991) (unsuccessful bidder's Application for Leave to Appeal denied for lack of standing); In re Planned Systems, Inc., 82 B.R. 919, 922 (Bankr. S.D. Ohio 1988) ("normally a frustrated bidder lacks standing to object to a sale of property"); In re Nepsco, Inc., 36 B.R. 25, 26-27 (Bankr. D. Me. 1983) (prospective bidder has no standing to object to bankruptcy sale); see also Big Shanty

Land Corp. v. Comer Properties, Inc., 61 B.R. 272, 277 (N.D. Ga. 1985) (bidder has no standing to appeal denial of motion for pre-confirmation sale of chapter 11 debtor's only asset).

G-K claims that it is more than an unsuccessful bidder because it had a "right" to purchase Broadmoor Place. G-K made the first offer for Broadmoor Place, and G-K claims that the Debtor accepted that offer. Neither the offer nor the acceptance could rule out competing offers. Freehill v. Greenfelder, 204 F.2d 907, 909 (2d Cir. 1953) ("the question at bar therefore comes down to whether the contract should be read to contain the implied condition that the 'approval of the court' meant an approval without exposing the property to the public bidding for a better price. We can see no basis for such an interpolation.") Rather than ruling out competing offers, G-K's offer and Debtor's acceptance engaged the bankruptcy court's power to permit and entertain competing offers for Broadmoor Place. In re Summit Corp., 891 F.2d 1, 5 (1st Cir. 1989) (bankruptcy court may provide for competitive bidding to maximize estate and to protect creditors).

Only after the bankruptcy court approved Robinson's offer and rejected G-K's offer did anyone have a right to purchase Broadmoor Place: "(T)here is simply no contract without Bankruptcy Court approval." In re Landscape Properties, Inc., 100 B.R. 445, 447 (Bankr. E.D. Ark. 1988).

II. THE DISTRICT COURT, UPON RECEIPT OF THE BANKRUPTCY COURT'S DETERMINATION THAT RESPONDENT ROBINSON WAS A GOOD FAITH PURCHASER, PROPERLY DISMISSED PETITIONER'S APPEAL AS MOOT; THIS DISMISSAL WAS AFFIRMED BY THE TENTH CIRCUIT'S DECISION.

On January 15, 1992 and February 12, 1992, the district

court dismissed G-K's appeals because Robinson was a good faith purchaser, the bankruptcy court's authorization of the sale of Broadmoor Place to Robinson was never stayed, the sale was never stayed, and the sale closed on December 7, 1990.

Rule 7062 of the Federal Rules of Bankruptcy Procedure, made applicable by Rule 9014 of the Federal Rules of Bankruptcy Procedure, provides that an order approving sale of property under 11 U.S.C. §363 becomes effective immediately unless stayed. Additionally, Rule 8005 of the Federal Rules of Bankruptcy Procedure generally requires the filing of a supersedeas bond pending appeal of a bankruptcy sale. These provisions for stay and supersedeas bond encourage participation in bankruptcy sales by protecting good faith purchasers, upholding the finality of bankruptcy sales, and discouraging appeals. See In re Andy Frain Services, Inc., 798 F.2d 1113, 1125 (7th Cir. 1986). These purposes would be defeated if an appellant could challenge specific terms of a bankruptcy sale without obtaining stay and posting a supersedeas bond. An unsuccessful bidder would then have a cheap and easy way to inject risk and uncertainty into bankruptcy sale procedures, and the risk and uncertainty would necessarily discourage participation in bankruptcy sales. Section 363(m) of the Bankruptcy Code, 11 U.S.C. §363(m), therefore precludes appellate review of any term of a bankruptcy sale when the appellant fails to obtain a stay and post a supersedeas bond: "... Given the important role that section 363(m) plays in assuring a good faith purchaser at a bankruptcy sale good title, we find that the sale, including all of its terms, cannot be challenged on appeal when the appellant fails to obtain a stay." In re Andy Frain Services, Inc., 798 F.2d at 1127.

There is no reason for distinguishing between appellate review of specific terms of a bankruptcy sale and appellate

review of a finding that a bankruptcy sale was made to a good faith purchaser. If appellate review of the former depends on a stay and supersedeas bond, appellate review of the latter must also depend on a stay and supersedeas bond. Section 363(m) precludes appellate review of the bankruptcy court's finding that Robinson was a good faith purchaser because the bankruptcy court's approval of the sale of Broadmoor Place to Robinson was not stayed pending appeal.

This appeal is moot notwithstanding the motion for stay filed by G-K. The last clause of section 363(m) required G-K to preserve the status quo by obtaining a stay of the bankruptcy court's authorization of the sale of Broadmoor Place to Robinson and a stay of the sale. The sale closed on December 7, 1990. The stay motion was filed before that date. The stay motion was defective in two respects. First, the stay motion did not request a stay of the sale. Second, the stay motion failed to comply with Federal Rules of Bankruptcy Procedure 8011(d) because G-K failed to designate it as an "emergency motion "and G-K failed to file an affidavit that stated the nature of the "emergency."[1]

Neither the bankruptcy court's approval of the sale of Broadmoor Place to Robinson, nor the sale itself was stayed pending G-K's appeal. The sale closed on December 7, 1990, and Robinson was a good faith purchaser; thus, this appeal is moot within the meaning of 11 U.S.C. §363(m).

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[1]D. Kan. Rule 206(b) allowed ten days for a response to the Stay Motion. G-K did not request a reduction of the ten day period, Bankruptcy Rule 9006(c)(1), and G-K did not request a hearing date. G-K thus took the risk that the District Court would not learn of the Stay Motion until the time for filing a response had expired and the sale had closed.

III. THERE EXISTS NO CONFLICT WITH THE DECISION OF THE TENTH CIRCUIT AND THE DECISIONS OF OTHER CIRCUIT COURTS REGARDING WHETHER AN APPEAL IS MOOT UNDER 11 U.S.C. §363(m) WHERE A STAY ORDER HAS NOT BEEN OBTAINED, THE SALE OF PROPERTY HAS OCCURRED, AND THE PURCHASER WAS A GOOD FAITH PURCHASER.

None of the mootness exceptions relied upon by petitioner are applicable to the instant case. In re Abbott Dairies of Pennsylvania, Inc., 788 F.2d 143 (3rd Cir. 1986), was an appeal by a creditor and bidder of the bankruptcy court order confirming sale of the debtors' assets to a purchaser after an auction. The court in Abbott held that the appeals were not moot because no finding of good faith as to the purchaser's behavior had been made by the bankruptcy court. In the present case, an explicit finding was made by the bankruptcy court that Robinson was a good faith purchaser in a private sale.

Petitioner relies on Abbott for the propositions that exceptions to mootness exist if (1) a bankruptcy court refuses to hear evidence on the issue of collusion; (2) a bankruptcy court receives no evidence on the issue of value of the debtor's assets to be sold; and (3) a district court dismisses an appeal as moot prior to reviewing the record on appeal. In the present case, the bankruptcy court did not refuse to hear evidence on this issue of collusion between debtor and purchaser; rather it was Mr. Gold, president of G-K Development and petitioner, who refused to attend the September 10, 1991 hearing and present evidence. The second exception is inapplicable since value of the Debtor's asset has not been an issue in the present case, and the only creditor who would have received money from the transaction consented to the sale to Robinson.

The record on appeal referenced in Abbott refers to an "emergency" hearing in the bankruptcy court; it is this emergency hearing record that the Third Circuit held should have been reviewed by the district court. See Abbott, 788 F.2d at 149. In the present case, there was no "emergency" hearing at the bankruptcy court. The district court had an opportunity to review the record on appeal, and after such review, properly granted the Motion to Dismiss based on mootness. None of the exceptions raised in Abbott are applicable to the facts in this case. No conflict exists between the Third Circuit and the Tenth Circuit on the issue of whether an appeal is moot under the present facts.

Petitioner asserts that if state law otherwise provides the basis for remedy, the purchaser is on notice and the appeal is not moot. Matter of Sullivan Century Plaza I, Ltd., 914 F.2d 731, 734 (5th Cir. 1990). Sullivan is an appeal from a bankruptcy court order granting a creditor relief from stay and withdrawing an injunction subsequently granted to the debtor as moot after the creditor foreclosed and purchased the property in question. The court states that "if the State law otherwise provides the basis for a remedy, the purchaser is on notice and the appeal is not moot." Id. at 734. Petitioner, in the instant case, has failed to assert other state law which provides the basis for a remedy. The public interest in expediting and finalizing bankruptcy sales encourages buyers to purchase the bankruptcy property; without mention of an alternative basis for a remedy, petitioner has not set forth any realistic interest which overrides the creditors' and public's interest in facilitating the bankruptcy process. There exists no conflict between the Fifth Circuit and the Tenth Circuit on the issue of whether an appeal is moot under 11 U.S.C. §363(m) as applied to the facts at bar.

Petitioner contends that a party has a right of appeal to review whether or not the finding of the bankruptcy court on the

issue of good faith purchaser under 11 U.S.C. §364(e) is erroneous. In the Matter of EDC Holding Co., 676 F.2d 945 (7th Cir. 1982). In EDC, the United States District Court dismissed as moot an appeal by a creditors' committee from the bankruptcy judge's approval of a loan to the bankrupt which involved a grant of special priority to the lender. The facts of EDC are readily distinguishable from those of the case at bar, in that EDC concerns a loan to a bankruptcy debtor by a bank which received special priority despite the fact that it knew of objections to its receiving priority with regard to portions of the loan. The Seventh Circuit held that since the stated purpose of using a portion of the loan to pay legal expenses was improper, the party had a right to appeal the bankruptcy court's finding on the issue of good faith lender. Id. at 947. The Court specifically stated that "... knowledge of the pendency of an appeal from a bankruptcy judge's order granting a lender special priority does not forfeit the protections that the statute gives to a lender who is in good faith . . ." Id. The court in comparing the lending situation to a bankruptcy sale, explained that "[t]he proper recourse for the objecting creditors is to get the transaction stayed pending appeal." Id. In the instant case, Robinson was found to be a purchaser in good faith, and petitioner failed to get the transaction stayed.

The primary concern of the Court in EDC was the improper use of the bankruptcy estate and the resulting harm to the general creditors. Id. at 949. In the case at bar, there are no general creditors who will suffer, as the purchase price of Broadmoor Place does not even cover the amount owed to RTC. The RTC has at no time complained, and indeed, has supported the sale of Broadmoor Place to Robinson. Based on the facts and the lack of evidence of bad faith, the Seventh Circuit is not in conflict with the Tenth Circuit on the issue of whether an appeal is moot

under 11 U.S.C. §363(m).

The Ninth Circuit recognizes two exceptions to the mootness rule: (1) where real property is sold to a creditor subject to the right of redemption; and (2) where state law would otherwise permit the transaction to be set aside. In re Mann, 907 F.2d 923, 926 (9th Cir. 1990). The first exception is clearly irrelevant to the facts at issue. Regarding the second exception, there is simply nothing in the records indicating that the transaction could be set aside. In Mann, the appellant claimed that the 1.5 million dollars received for bankrupt property was grossly inadequate and that there was evidence of irregularity and unfairness surrounding the sale. Id. at 927. The court of appeals held that there was no basis for setting aside the foreclosure sale and the appeal of the sale was moot. Id. at 928. In the present case, there exists no indication of inadequate price or any evidence of irregularity or unfairness surrounding the sale to Robinson. While petitioner may argue that its offer should have been accepted due to its higher price, the bankruptcy court explicitly stated that it preferred Robinson's offer because it provided a $50,000 earnest money deposit, fewer contingencies and a more immediate closing than G-K's offer. Given that neither of the two exceptions to mootness recognized by the Ninth Circuit are applicable to the facts at bar, the Ninth Circuit does not conflict with the Tenth Circuit on the issue of whether an appeal is moot under 11 U.S.C. §363(m) as applied to the facts at bar.

Petitioner further contends that the Tenth Circuit's decision applying existing case law is in direct conflict with the Seventh Circuit's decision in Bastion v. Lake Front Realty Corp., 581 F.2d 685 (7th Cir. 1978). Bastion is a fact specific holding concerning securities laws; it does not involve the sale of property under 11 U.S.C. §363(m). Given the fact that Bastion

does not address a bankruptcy issue, there exists no direct conflict between the Tenth Circuit decision and the holding in Bastion.

Petitioner states that no circuit court of appeals in ruling on an appeal involving 11 U.S.C. §363(m) has recognized the additional exceptions to mootness that address (1) a court's failure to rule on a party's Motion for Stay; (2) where an appellant has taken all steps necessary to perfect the appeal and preserve the status quo; (3) where the underlying dispute between the parties is capable of repetition; and (4) where the trial court's order would have possible collateral legal consequences. The fact that no circuit court of appeals has recognized these additional exceptions to mootness is not sufficient ground to consider and grant writ of certiorari pursuant to Supreme Court Rules 10 and 16.

In summary, each case addressed by petitioner is easily distinguished from the facts at bar. The cases cited by petitioner do not illustrate a conflict between the circuit courts nor do they demonstrate any other basis for granting certiorari. To grant certiorari in the present case would hinder the objectives of Supreme Court Rule 10 which states that "[a] petition for writ of certiorari will be granted only when there are special and important reasons therefor."

IV. THE TENTH CIRCUIT DECISION DOES NOT CONFLICT WITH THE PRINCIPLE THAT INTERESTS IN PROPERTY ARE DEFINED BY STATE LAW.

A. The Tenth Circuit decision does not conflict with this Court's holding in Butner v. United States, 440 U.S. 48 (1979).

Petitioner relies on Butner for the proposition that state law

applies to the determination of interest in property in bankruptcy proceedings. This Court granted certiorari in Butner in order to resolve whether reference to state law should be made in determining whether a security interest in property extends to rents and profits derived from the property. Butner, 440 U.S. at 52. The facts of Butner are not at all analogous with the facts at bar. Butner involves a dispute between a bankruptcy trustee and a second mortgagee concerning the right to the rents collected during the period between the mortgagor's bankruptcy and the foreclosure sale of the mortgaged property. Id. at 49. Petitioner relies on a general assertion in Butner which states that Congress has left the determination of property rights in the assets of a bankrupt's estate to state law. Id. at 54. However, the Court held specifically in Butner that "the constitutional authority of Congress to establish, 'uniform laws on the subject of bankruptcy throughout the United States' would clearly encompass a federal statute defining the mortgagee's interests in the rents and profits earned by the property in the bankrupt estate. The Congress has not chosen to exercise its power to fashion any such rule." Id. In the present case, Congress has chosen to exercise its power to fashion 11 U.S.C. §363(m) which specifically states that an appeal is moot where a stay order has not been obtained, upon completion of a sale to a good faith purchaser. Thus the general proposition of Butner that state law applies to determinations of interest in property in bankruptcy proceedings is superseded by the specific language of 11 U.S.C. §363(m).

Petitioner again alleges in Section II A of the Petition that Robinson admitted knowledge that Debtor had executed a contract with petitioner for the purchase of Debtor's real property. It is urged that no such contract was executed given that no contract could exist prior to approval of the bankruptcy court. Petitioner was merely an unsuccessful bidder as explained in

Section I of this Brief in Opposition, and Robinson was at all times a "good faith purchaser."

The cases relied upon by petitioner in support of its proposition that Robinson is not a good faith purchaser are factually distinguishable from the present facts. In Hughes v. Cook, 232 P. 219 (Kan. 1925), the second purchaser of real estate had actual knowledge of the first purchaser's contract for sale. Similarly, Federal Savings & Loan Ins. Corp. v. Urschel, 157 P.2d 805 (Kan. 1945), supports the proposition that "one who has acquired a right or interest in real estate under an unrecorded contract may assert and maintain his right and interest therein even as against one who has subsequently purchased that real estate from the record owner if such subsequent purchaser had actual or implied notice of the right and interest possessed by the holder of the unrecorded instrument." Id. at 806. Finally, Urschel involves rights under a real estate contract and not a bankruptcy proceeding. The case at bar involves no contract rights nor does it address issues concerning the recording of real estate agreements.

Petitioner states that in Kansas, a party who signs a contract with the representative of an estate is bound to that contract and cannot withdraw without cause, citing Schul v. Clapp, 118 P.2d 570 (Kan. 1941). Robinson is unable to determine what part of the case petitioner is relying on for the above-stated principle. Petitioner relies on Camden v. Mayhew, 129 U.S. 73 (1889), for the proposition that this principle has been applied in bankruptcy; Robinson contends that this case law is inapplicable to the facts at bar. Petitioner asserts that both purchaser and debtor, upon execution of a contract, are bound until they are judicially relieved by the bankruptcy court. See Petition for Writ of Certiorari at 10, fn. 3. Because no contract existed prior to bankruptcy court approval of the sale, this argument is

inapplicable to the present case. Even assuming, in the alternative, that a contract were to be found, both petitioner and Debtor are no longer bound by such a "contract" because they were judicially relieved by the bankruptcy court through the bankruptcy court order approving sale to Robinson.

Petitioner alleges that the majority of circuits, in adopting the definition of good faith purchase set out in In re Rock Industry Machinery Corp., 572 F.2d 1195 (7th Cir. 1978), have created a federal common law of real property. The federal common law definition of good faith purchaser status does not conflict with the Kansas state real property standard which petitioner alleges should be applied to the facts at bar. Petitioner claims that Kansas has long defined "good faith purchaser" as one who purchases in good faith, for valuable consideration and without notice of the rights of other parties. Kruse v. Conklin, 108 P. 856 (Kan. 1910). The In re Rock definition describes the equitable principles of a good faith purchaser as one who buys in good faith, that is, free of any fraud, misconduct or collusion between the purchaser and other bidders or the debtor; for value; and without knowledge of any adverse claim. In re Rock, 572 F.2d at 1197-98. These definitions are virtually identical. Even if this Court were to find that state law applies to the present case, despite Robinson's belief that it does not, Robinson has fulfilled the requirements to be a good faith purchaser under Kansas law and the bankruptcy court has affirmed Robinson's status as a good faith purchaser. Petitioner has identified no conflict between the circuits nor has it shown a conflict with Kansas state real property law which it incorrectly alleges ought to be applied to the case. Lack of reference to Kansas real property principles by the Tenth Circuit does not justify the grant of certiorari by this Court.

B. Respondent Robinson did not receive a windfall by the happenstance of bankruptcy.

Petitioner relies upon Lewis v. Manufacturers National Bank, 364 U.S. 603, 706 (1961), for the proposition that Robinson may not receive a windfall by the happenstance of bankruptcy. Lewis involved a chattel mortgage that was not recorded until four days after its execution. Lewis held that the rights of creditors, whether they be existing or hypothetical, to which the trustee in bankruptcy succeeds are to be ascertained as of "the date of bankruptcy," i.e. when the petition of bankruptcy is filed. The Court's primary concern in Lewis was that it would inadvertently "enrich unsecured creditors at the expense of secured creditors, creating a windfall merely by reason of the happenstance of bankruptcy." Lewis, 364 U.S. at 608-09. The factual setting of Lewis is inapplicable to the facts at bar. In the present case, the purchase price of Broadmoor Place did not satisfy even the debt owed to RTC. Therefore the threat of a windfall enriching unsecured creditors does not exist as it did in Lewis. Robinson in no way received a windfall by the happenstance of bankruptcy. Robinson has been deemed a good faith purchaser in the bankruptcy court and would be so deemed in the Kansas state court as well; thus there exists no conflict between the Tenth Circuit's decision and the decision of this Court in Lewis.

C. Alleged conflict between the Tenth Circuit's decision and the decision of lower courts on the issue that, in bankruptcy, good faith purchaser status is determined by state law, is not a legitimate reason to grant certiorari pursuant to Supreme Court Rule 10; Robinson was a good faith purchaser.

Petitioner cites In re Flannery, 11 B.R. 974 (Bankr. E.D. Pa 1981) for the proposition that where a debtor executed two contracts for the sale of its sole real estate asset, approval of the

first contract was mandated because the second buyer could not qualify as a good faith purchaser due to his knowledge of the first contract. The court in Flannery stated that "since the agreement was executed prior to [defendants] agreement of sale, petitioners agreement should be approved by us absent any reason to hold to the contrary." (emphasis added) Id. at 977. In the instant case, the bankruptcy court expressly stated that approval of Robinson's offer was more beneficial than approval of petitioner's offer due to the $50,000.00 earnest deposit made by Robinson, the lack of other contingencies and the facilitation of an earlier closing. The bankruptcy court found these conditions worthy of extra consideration; its discretion should not be overruled in light of lower court decisions, such as Flannery, which petitioner improperly alleges are analogous to the instant case.

Furthermore, the bankruptcy court was correct in ruling that Robinson was a "good faith purchaser" pursuant to §363(m) of the Bankruptcy Code. While the Bankruptcy Code does not define "good faith purchaser", as used in §363(m), the courts have held that only fraud, collusion or obtaining grossly unfair advantage is sufficient to defeat the good faith status of a purchaser. See In re Rock, 572 F.2d at 1198. The purpose of the good faith purchaser requirement is to protect the creditors of the bankruptcy estate from sales of property for less than adequate value. In this case, RTC held a first priority secured claim against Broadmoor Place property in an amount far in excess of the price offered by Robinson or G-K. The only two parties affected by the sale are RTC and Carteret Savings & Loan, a participant in the loan to the Debtor. The most significant fact for this Court's consideration is that neither RTC nor Carteret objected to the sale. Indeed, RTC supported the offer of Robinson at the initial hearing in the matter primarily because the Robinson offer provided for a cash sale without contingencies. RTC and

Carteret continued to support the sale of the property to Robinson throughout the appellate process initiated by Mr. Gold and G-K. The governing principle in approving a sale is the securing of the best sale for the bankruptcy estate. See In re General Insecticide Co., 403 F.2d 629, 631 (2d Cir. 1968).

Thus the analogy to Flannery alleged by Petitioner is invalid on two bases; (1) Robinson was a good faith purchaser at all times, and (2) alternatively, in the event that a conflict does exist between the Tenth Circuit decision and that of the lower court, this Court is not the proper forum in which to address that conflict since it is not a conflict between two United States courts of appeal.

V. THE APPROVAL OF THE SALE OF THE BROADMOOR PLACE TO ROBINSON WAS A SOUND AND PROPER EXERCISE OF THE BANKRUPTCY COURT'S DISCRETION; THE ALLEGED CONFLICT OF THE TENTH CIRCUIT'S DECISION WITH DECISIONS OF LOWER COURTS IS NOT A VALID BASIS FOR THE GRANTING OF CERTIORARI.

The authorization for the sale of the Broadmoor Place was within the bankruptcy court's discretion. See, e.g., In re Martin Trigona, 760 F.2d 1334, 1346 (2d Cir. 1985) (". . . Judge Cabranes's . . . approval of the sale . . . was a proper exercise of his discretion . . ."); In re Vanguard Oil and Service Co., 88 B.R. 576, 581 (E.D.N.Y. 1988) ("it is within the discretion of the bankruptcy judge whether to approve a trustee's proposed sale of property of the estate."); In re Alves, 52 B.R. 353, 355 (Bankr. D.R.I. 1985) (same). The rejection of G-K's offer and the approval of Robinson's offer was a sound and proper exercise of the bankruptcy court's discretion. This is particularly true when the RTC opposed G-K's offer, supported Robinson's offer and

was entitled to 100% of the sale proceeds. See In re Martin-Trigona, 760 F.2d at 1346 ("even if we were to assume that through other efforts a purchaser would be obtained for the station who was willing to pay even double the Wardoco offer, Capital would still be entitled to receive all of the increase. Without evidence of any likelihood of the debtor's realizing any equity after the liquidation, it is difficult to envision any prejudice to either the debtor corporation or to Martin-Trigona, its sole Stockholder.").

Petitioner contends that the bankruptcy court was in error in having both the G-K and Robinson offers before it at the same time for consideration. Petitioner further asserts that by making a selection, the Court improperly participated in the administration of the bankrupt's estate, thereby performing a duty which the Bankruptcy Code of 1978 allocated to the trustee or debtor in possession. See In the Matter of Ohio Corrugating Co., 59 B.R. 11 (Bankr. N.D. Ohio 1985). In Ohio Corrugating, the debtor requested that the court choose between two competing bidders. This was not the case in the present situation, Debtor in the instant case sought approval of the sale of Broadmoor Place. In its May 21, 1991 judgment the Tenth Circuit stated that:

> While there is support for its position that a bankruptcy court cannot be presented with competing bids from which it is to choose, since that would involve it in an impermissible participation in the administration of a bankrupt's estate, we hold that a bankruptcy court in a case such as this does have the power to disapprove a proposed sale recommended by a trustee or debtor in possession if it has an awareness, there is another proposal in hand which, from the estate point of view, is better or more acceptable.

The Tenth Circuit, in this determination, relied on In re Summit Corp., 891 F.2d 1, 5 (1st Cir. 1989), which stated that "in order to achieve the goals of maximizing the value of the

estate and protecting the interest of creditors, the court has plenary power to provide for competitive bidding."

Had the Debtor requested that the bankruptcy court make a choice between G-K and Robinson, this may have been an impermissible administrative act; however, the court used its own discretion in deciding to disapprove Debtor's recommendation that G-K be awarded the sale. Furthermore, Bankruptcy Rule 6005 is inapplicable to the instant case as the sale occurred through a private acquisition, and the bankruptcy court was never placed in the position to act as an auctioneer or appraiser. The discretion of the bankruptcy court was required to reach an equitable and just resolution, and the Tenth Circuit's decision should not be disrupted due to lower court decisions which are based on distinguishable facts.

VI. THE NOTICE OF THE SEPTEMBER 10, 1990 HEARING WAS PROPER IN ALL RESPECTS AND PETITIONER WAS GIVEN AN OPPORTUNITY TO PRESENT OBJECTIONS AFTER RECEIVING PROPER NOTICE.

G-K and all other interested parties received adequate notice of the hearing on the Application for Sale of the Property. Bankruptcy Rule 2002(c)(1) provides:

> Subject to Rule 6004 the notice of a proposed use sale or lease of property required by subdivision (a)(2) of this Rule Shall include the time and place of any public sale, the terms and conditions of any private sale and the time fixed for filing objections. The notice of a proposed use, sale or lease of property, including real estate, is sufficient if it generally describes the property.

The purpose of the notice is to provide ample opportunity for objections and hearing before the court if there are objections. In re Karpe, 84 B.R. 926, 930 (Bankr. M.D.Pa. 1988). The notice, however, need not include all the information which

would accompany a disclosure statement. In re Delaware & Hudson Ry. Co., 124 B.R. 169, 180 (D.Del. 1991).

The notice mailed by Debtor included the following information:

(a) a copy of the Application without exhibits;
(b) the date and time within which to file objections; and
(c) if objections were timely filed, the date, time and place for a hearing on the objections.

Debtor also mailed to each interested party the Application, which included a description of the property and copies of the G-K offer and Robinson offer, in full.

While the Robinson offer identified Robinson as the purchaser, it also provided that the contract was freely assignable and that it was subject to a continuing one year management contract with Broadmoor, Inc. It set forth all the terms and conditions of the sale of the property, including time to perform, earnest money deposit and purchase price, and a legal description of the real estate. Neither G-K nor its attorney filed a timely written objection to the Robinson offer or the form of notice. Lack of objection is especially noteworthy given that Mr. Gold, attorney of record on the present Petition and president of G-K, did not find it necessary to attend the majority of the September 10th hearing.

The bankruptcy court in its Order dated December 7, 1990, approving the Stipulation Regarding Sale, specifically found that adequate and sufficient notice and opportunity for hearing were given in connection with the Application and that the notice and opportunity to be heard satisfied in all respects 11 U.S.C. §363(m) and Bankruptcy Rule 2002.

Neither G-K nor its attorney objected to either the assignability clause or the management contract clause of the Robinson offer, either in writing or at the hearing. Neither G-K

nor its attorney objected on the record at the hearing regarding the assignment of the Robinson offer to a joint venture.

The bankruptcy court properly denied G-K's attempt to conduct discovery and introduce evidence on limited remand from the district court. Throughout the many motions, objections and maneuverings of G-K after September 10, 1990, the bankruptcy court consistently and correctly ruled that G-K was accorded a full and fair opportunity to present its evidence at the September 10, 1990 hearing. Mr. Gold had other matters which he deemed more important on that day.

G-K presents virtually the same arguments to this Court as it presented to the district court and the Tenth Circuit. Had the district court felt that a new trial was needed on remand, it could have so ordered a new trial. Instead, the district court merely remanded the case to the bankruptcy court to make a factual finding. The bankruptcy court was well within its discretion to make this finding on the evidence received at the original hearing.

Even if the bankruptcy court intended to conduct a new evidentiary hearing, G-K cannot conduct examinations under Bankruptcy Rule 2004(a) which provides:

> On motion of any party in interest, the court may order the examination of an entity. (emphasis added)

G-K is not a party in interest in the bankruptcy proceeding and does not have standing to request a Rule 2004 examination. While certain other means of discovery might have been available under Part IX of the Federal Rules of Bankruptcy Procedure, G-K did not choose to proceed in this manner.

There is no doubt that general due process standards apply in bankruptcy proceedings. G-K however apparently contends that due process entitles a party to two trials. There exists no case law requiring such a replication in trials.

VII. THE PRINCIPLE THAT FILING A NOTICE OF APPEAL CONFERS JURISDICTION ON THE APPELLATE COURT AND DIVESTS THE TRIAL COURT OF CONTROL OVER THOSE ASPECTS OF THE CASE INVOLVED IN THE APPEAL DOES NOT APPLY IN THE PRESENT CASE.

The Supplemental Opinion entered July 26, 1991 by the bankruptcy court, added additional findings to the original Order of November 1, 1990. In its Order on Motion for G-K Development Company for Reconsideration, of November 1, 1990, the bankruptcy court reserved the right to enter a written opinion upon appeal of its previous orders. While it is true that the filing of a notice of appeal confers jurisdiction on the court of appeals and divests the district court of control over those aspects of the case involved in the appeal, an exception to this general principle exists when the court's amendment did "not interfere with but instead facilitated review of the pending appeal . . .." Marrese v. American Academy of Orthopedic Surgeons, 470 U.S. 373, 379 (1985). Marrese involved an appeal to the court of appeals from the district court, whereas the case at bar concerns an appeal to the district court from the bankruptcy court. Given that the Supplemental Opinion facilitated review of the pending appeal and that the courts at issue in Marrese are different from those involved in the present case, the Tenth Circuit's decision permitting reliance upon the Supplemental Opinion of the bankruptcy court is easily reconciled with this Court's prior opinion in Marrese.

CONCLUSION

Petitioner has not set forth special and important reasons why this Court should review the Tenth Circuit decision on Writ of Certiorari; the Tenth Circuit decision does not conflict with the decision of any other United States Court of Appeals on the same matter. Therefore, pursuant to Supreme Court Rule 16, respondent Robinson prays that the Petition for Writ of Certiorari be denied and the Order of the United States Court of Appeals for the Tenth Circuit remain undisturbed.

Respectfully submitted,

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